82-1480

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

1983 TERM

DAVID KLINE

Petitioner,

Versus

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

ELLIS & ELLIS
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Phone 318-728-2043
Counsel for Petitioner

David Kline, a citizen of the State of Louisiana and of the United States, prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of Louisiana on December 1, 1962, affirming the conviction and sentence of your petitioner in a criminal case.

Questions Presented for Review

(1) Can a peace officer conduct a search and seizure of a local citizen's vehicle based on a three day old tip from an informant without first obtaining a search warrant from either of two resident judges?

(2) Is it an unlawful intrusion upon a party's right to be free from governmental interference when a peace officer in a clearly marked police car awaits the return from work of a local truck driver at 3:00 A.M. and then

effects a warrantless search of his vehicle?

(3) Does the mere observation of a gun case in a local citizen's stopped vehicle constitute a "plain view" exception to the warrant requirement, absent exigent circumstances?

List of Parties to Proceeding

David Kline - Petitioner

State of Louisiana - Prosecuting authority and Respondent

Honorable Lowen B. Loftin, District Attorney in and for the Fifth District Court, State of Louisiana, Parish of Franklin

Honorable E. R. McIntyre, Jr., Assistant District Attorney in the above district.

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TABLE OF AUTHORITIES

Statutory

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Official Report of the Case

The Memorandum Decision of the Louisiana Supreme Court affirming petitioner's conviction sought to be reviewed herein is reported at Vol. 424, Southern Reporter (2nd) #82-KA-0858, the Application for Rehearing having been denied on January 7, 1983 (One Dissent).

Grounds on which Jurisdiction of United States Supreme Court Invoked

The Louisiana Supreme Court affirmed the conviction of the defendant of the offense of "Possession of a Firearm after a Prior Conviction of Simple Burglary" by way of Memorandum Decision entered December 1, 1982. An Application for Rehearing was timely filed and was denied on January 7, 1983, followed by a 60 day Stay Order of Execution rendered January 17, 1983. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Sec. 1257 (3) and 28 U.S.C. Sec. 2101.

Constitutional Provisions Involved

The principal consitutional provision involved in this case is the Fourth Amendment to the United States Constitution requiring a warrant based on probable cause for the search and seizure of a person's belongings.

Statement of the Case

This case involves a warrantless arrest of the defendant and a warrantless search of his vehicle and seizure of an encased firearm, after the vehicle was stopped by a peace officer at 3:00 A.M. in the morning. The warrantless action taken by the peace officer was based upon a tip received some three days previously by an informant to the effect that the defendant carried a firearm in his truck when returning home after work in the wee hours of the morning.

For some time prior to January 9, 1981, the defendant, David Kline was employed by Thompson Trucking Company of Winnsboro, Louisiana as a driver of a transport truck. His driving routes for his employer originated from the Town of Winnsboro to various points of delivery and pickup of cargo material in various towns and cities of Northeast Louisiana and adjoining States and then return to Winnsboro. His invariable sechedule, or routine, was to depart from Winnsboro at 2:00 in the afternoon and return to Winnsboro around 3:00 or 3:30 o'clock the following morning. Deputy Sheriff Larry Crum was completely familiar with the defendant's daily work routine, as the following excerpt from his testimony on cross-examination demonstrates:

Q. You knew he worked for W. B. Thompson and drove a transport truck?

A. Yes Sir.

Q. And that he made daily trips from Winnsboro to other places and would return early in the morning hours, you knew that didn't you?

A. Yes Sir, I did.
(See Transcript, Pages 24-25)

At about 3:00 o'clock A.M. on the morning of January 9, 1981, the defendant returned to Winnsboro in his employer's transport truck and parked it in the parking area provided for the vehicle. He then got into his own pickup truck and started driving toward his home a few miles North of Winnsboro. Deputy Crum was in his official car parked on the street a short distance away, where he had been waiting for some time. When the defendant drove by, Deputy Crum drove his car in behind the defendant's truck and after following for some little distance, the defendant pulled over and stopped his truck and Deputy Crum did the same. Deputy Crum then looked in the cab of defendant's truck and saw a

"black case" that he "recognized as a pistol case". Upon being asked about it, the defendant stated that his pistol was in the case. Deputy Crum then removed the case from the vehicle, unzipped it and found a "long barrel revolver" therein which he retrieved and kept. Deputy Crum then arrested the defendant for Possession of a Firearm while on probation for a previous offense and advised him of his rights.

At the time of stopping of defendant's truck by Deputy Crum and his retrieval of the pistol from the cab thereof, there was no warrant for the search and seizure of evidence from the defendant's truck in the manner set out hereinabove. The alleged basis for the search, seizure and arrest was information Deputy Crum testified he had received from a confidential informant. However, he admitted that this information had been given to

him about THREE DAYS PRIOR TO HIS SEARCH AND SEIZURE OF DEFENDANT'S TRUCK. The following excerpt from Dy. Crum's testimony at the hearing on the Motion to Suppress (on cross-examination) establishes his prior knowledge as well as his weak explanation of no prior action thereon:

> Q. But the information you had which led to your staking out and waiting for Mr. Kline, you had a full three days ahead of time, from the time that you did actually stop him and actually make the search and seizure, whether he stoped because of you or whether you stopped him?
>
> A. Yes Sir.
>
> Q. There are two Judges here in Winnsboro authorized to execute warrants, so it wasn't a matter of having to execute a warrant that night, you had the information you felt you needed to give you probable cause three days ahead of this search and seizure, did you not?
>
> A. As I stated earlier, I didn't intend to stop or search him, I was just looking to see how he was. I hadn't seen Mr. Kline in several days. I parked there to see what his actions were as he left work. (See Transcript, Page 26) (Comment: AT 3:00 O'CLOCK IN THE MORNING?!)

After his arrest, the defendant was eventually charged by Bill of Information filed on June 12, 1981 with the offense of Possession of a Firearm after having been convicted of Burglary on October 20, 1980, a felony in the State of Louisiana, as per Revised Statutes 14:95.1.

Prior to trial, defendant, through undersigned counsel, timely filed a Motion to Suppress evidence based upon the warrantless stopping and searching of the truck in which he was riding as set out hereinabove. This Motion to Suppress was tried on Novmeber 25, 1981, with testimony put on by the State (which admittedly has the burden of proof) being recorded and later transcribed as the Note of Evidence in this case. The trial judge overruled the Motion to Suppress, to which ruling the defendant noted an objection.

On February 19, 1982, the State moved that the Bill of Information previously filed be amended to "Attempted Possession of a Firearm by a Convicted Felon". The defendant, through counsel, then withdrew his former plea of Not Guilty and entered a plea of Guilty to the reduced charge, with the reservation of the right to appeal the adverse ruling of the Court on the Motion to Suppress, as permitted by the rule of State vs. Crosby, 338 So. (2d) 584 (1976). Then the Court sentenced the defendant to one and one-half years at hard labor under the supervision of the Department of Corrections. An appeal to the Louisiana Supreme Court was taken by defendant and timely filed therein. Included in the record of that appeal was an Assignment of Error filed by counsel for the defendant based upon the trial judge's overruling of defendant's Motion to Suppress prior to trial.

ARGUMENT

May It Please The Court:

As set out in the Statement of the Case hereinabove, this case presents the question of the validity of a warrantless search of a person's vehicle based upon a tip from an informant received three (3) days earlier. By his own admission, the peace officer in question was completely familiar with the defendant's daily work routine, and he was also well aware that there were two district judges residing in the small town of Winnsboro available for obtaining the required search warrant. Yet he gave no explanation for his failure to obtain a warrant.

Since defendant's conviction was affirmed by Memorandum decision, we have no written opinion of the Louisiana Supreme Court from which to deduce any basis for the Court's excusing the obtaining of a warrant. From the Briefs filed by the

Prosecution, it was contended that the automobile exception to the warrant requirement applied to the case and that the "plain view" doctrine also applied. We submit that neither of these are applicable to this case and that the Louisiana Supreme Court erred in failing to reverse the lower court's ruling on defendant's Motion to Suppress.

The Automobile Exception
- The "Carroll" Doctrine

This Exception harks back to Carroll vs. U.S., 267 U.S. 132, 45 S.Ct. 280 (1925) where officers having probable cause made a warrantless search of a car on a public highway which yielded contraband liquor. This narrow exception to the warrant requirement has been interpreted and embellished by numerous decisions of this Honorable Court. Not only must there exist probable cause on the part of the arresting officers, but exigent

circumstances must also be present in order for this automobile exception to be invoked. In Carroll, the basis for the creation of the exception was shown by the following reasoning of the Court:

> ". . . . . .there is a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." See 267 U.S. 132, 153, 45 S.Ct. 280, 285.

Demonstrating the continuation of the exception over the years, the following excerpt is taken from Your Honors decision in Coolidge vs. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971):

> "As we said in Chambers, supra, ...'exigent circumstances' justified the warrantless search of 'an automobile stopped on the highway' where there is probable cause, because the car is 'movable, the occupants are alerted, and the car's contents may

never be found again if a warrant must be obtained.. . . . . .the opportunity to search is fleeting' (Chambers vs. Maroney, 399 U.S. 42, 990 S.Ct. 1975)."

This is not a case in which the automobile exception applies in any sense of the word. We are dealing here with "home folks" in a small town, each well known to the other. Deputy Crum was completely familiar with defendant's working routine, as he admitted, and yet failed to obtain a warrant although he had ample time and opportunity to do so. The following excerpt from this Honorable Court's Opinion in Coolidge is extremely apropos:

"(13) The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears. And surely there is nothing in this case to invoke the meaning and purpose of the rule of Caroll vs. United States - no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband, no stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detailed to guard the mobilized automobile. In short, by no possible stretch of the

> legal imagination can this be made into a case where 'it is not practicable to secure a warrant' . . . . . .'and the automobile exception', despite its label, is simply irrelevant." See 403 U.S. 493, _____, 91 S.Ct. 2022, 2035-2036.

Undersigned counsel is aware of Your Honors' recent decision in United States vs. Ross, 102 S.Ct. 2157 (1982) where the "automobile exception" was extended to include the right to search containers found in an automobile legitimately stopped by peace officers under the Carroll Doctrine. However, in our appreciation, Ross does not apply to a case in which the "automobile exception" is entirely absent, as in Coolidge and as in the instant case.

The "Plain View" Doctrine

The prosecution contends that this case presents a factual situation for the application of the 'plain view" doctrine, or exception to the warrant requirement. This doctrine also had extensive examina-

tion by this Court in Coolidge, wherein the following introductory approach to this exception was made:

> "It is well established that under certain circumstances the police may seize evidence in plain view without a warrant. But it is important to keep in mind that in the vast majority of cases, any evidence seized by the police will be in plain view, at least at the moment of seizure. The problem with the 'plain view' doctrine has been to identify the circumstances in which plain view has legal significance other than being simply the normal concomitant of any search, legal or illegal." 91 S. Ct. 2022, 2037.

In the same case, the Supreme Court made the following remarks concerning the doctrine:

> "(23-25) The limits on the doctrine are implicit in the statement of its rationale. The first of these is that plain view alone is never enough to justify the warrantless search of evidence. This is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search and seizure absent 'exigent circumstances'. Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even

> where the object is contraband, this Court has repeatedly stated and enforced the basic principle that the police may not enter and make a warrantless seizure." (citing many cases) See 91 S. Ct. 2022, 2039.

From the words of Deputy Crum's own mouth, after waiting three days without obtaining a warrant based on tipster information, he himself "lay in wait" for the defendant to get into his own vehicle and then effected a stop of the automobile to look inside for what he was certain that he would find. The conclusion is inescapable that the peace officer knew in advance the location of the evidence and intended to seize it from the beginning of his stake-out. Again, this Court's opinion in Coolidge deals with this precise situation, as shown by the following excerpt:

> "(26-27) The second limitation is that the discovery of evidence in plain view must be inadvertent. The rationale, as just stated, is that a plain view seizure will not turn an intiially valid (and therefore limited) search

> into a 'general' one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as 'per se unreasonable' in the absence of 'exigent circumstances'." See 91 S. Ct. 2022, 2040.

In footnote 27 of the same case, page 2041, we find the following amplification of the Court's view as to the doctrine under consideration:

> ". . . . . .this Court has never permitted the legitimation of a planned warrantless seizure on plain view grounds. . . . . and to do so here would be flatly inconsistent with the existing body of Fourth Amendment law . . . . . " 91 S. Ct. 2022, 2041. (Emphisis supplied).

Most importantly, the plain view doctrine in warrantless automobile search cases not only requires that a valid automobile exception be present (which is not the case here), it also has the require-

ment of "exigent circumstances" to justify an invoking of the exception on the part of the prosecution.

As pointed out in the earlier part of this argument, "exigent circumstances" as described in the cases cited hereinabove, are simply absent from the facts of this case. A peace officer waited three days on a stale tip to lay in wait for the defendant to get in his own vehicle to return home and then asserts that the defendant's vehicle thus provides the talisman to execute a warrantless search. We submit that such a result is contrary to the Fourth Amendment and to the pronouncements of this Court in numerous cases based on similar facts.

CONCLUSION

For the reasons set forth, it is respectfully sibmitted that this peti-

tion for Writ of Certiorari should be granted.

Respectfully submitted,

ELLIS& ELLIS

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Pho. (318)-728-2043

Dec. 1, 1982

SUPREME COURT OF LOUISIANA

NO. 82-KA-0356

STATE OF LOUISIANA

V.

DAVID KLINE

Appeal from the 5th Judicial District
Court, Parish of Franklin,
Honorable Sonny N. Stephens, Judge.

PER CURIAM

Affirmed.

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112

NEWS RELEASE #1

FOR IMMEDIATE NEWS RELEASE

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On January 7, 1983, the following action was taken by the Supreme Court of Louisiana, composed of Chief Justice John A. Dixon, Jr., and Assoicate Justices Pascal F. Calogero, Jr., Walter F. Marcus, Jr., James L. Dennis, Fred A. Blanche, Jr., Jack Crozier Watson, and Harry T. Lemmon, in the cases listed below:

REHEARINGS DENIED:

. . . . . .

. . . . . .

82-KA-0858 State v. David Kline
Calogero, J., would grant a rehearing.

. . . . . .

. . . . . .

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

VERSUS FILED:Jan. 17, 1983

DAVID KLINE

APPLICATION AND ORDER
FOR STAY OF EXECUTION

UPON MOTION of DAVID KLINE, defendant-appellant in the above styled and numbered cause, through his undersigned counsel, and on suggesting to this Honorable Court that its decree of December 1, 1982 affirming the verdict and sentence of the Fifth District Court in and for the Parish of Franklin is now final, this Court having refused an Application for Rehearing on January 7, 1983 and on further suggesting that the defendant is desirous of applying to the Supreme Court of the United State for a Writ of Certiorari to review the decision of this Honorable Court upon the Constitutional issue raised in said cause and as shown

by the record of the same:

IT IS ORDERED That petitioner, DAVID KLINE, be granted a Stay of Execution of the Decree of this Honorable Court for a period of 60 days from this date.

DONE AND SIGNED In Chambers on this the 17th day of January, 1983.

New Orleans, Louisiana s/ John A. Dixon
JUSTICE

/s/ Carey J. Ellis, Jr.
CAREY J. ELLIS, JR.
Counsel for Defendant-Petitioner
Rayville, Louisiana

January 13, 1983.

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NO. 82-1480

IN THE

SUPREME COURT OF THE UNITED STATES

1983 TERM

DAVID KLINE

Petitioner,

Versus

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

RESPONSE OPPOSING PETITION FOR WRIT OF CERTIORARI

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STATUTES

STATEMENT OF THE CASE

The defendant was convicted of the crime of Simple Burglary in violation of Louisiana Revised Statutes 14:62 in the Fifth Judicial District Court, Franklin Parish, Louisiana, on October 20, 1980. The defendant was sentenced to serve for a period of three years at hard labor under the supervision of the Louisiana Department of Corrections which said sentence was suspended and he was placed on active supervised probation for a period of three years.

Within three days prior to January 9, 1981, Deputy Larry Crum of the Franklin Parish Sheriff's Office received information from a confidential reliable informant that the defendant was in the possession of a long barrel revolver. The informant told Deputy Crum that the defendant carried the pistol back and forth to work with him in his truck and in the truck he drove for his employer. The informant stated that the information was based on first-hand per-

sonal observation of the pistol in the possession of the defendant.

Deputy Crum was familiar with the defendant, his personal truck and the pistol and its black case having arrested the defendant previously on the simple burglary charge and on a possession of marijuana charge. Deputy Crum had observed these items during the defendant's prior arrests. Deputy Crum also knew where the defendant worked.

Sometime after receiving the information from the informant but prior to January 9, 1981, Deputy Crum contacted the defendant's probation officer, Ezell Thomas, to determine if the defendant was violating the conditions of his probation by possessing a firearm. The probation officer informed Deputy Crum that the defendant was not allowed to possess a firearm.

With this information in mind, Deputy Crum, working by himself, parked his police vehicle a short distance down the street from where the defendant worked and observed him drive away in his truck from the premises at about 3:15 A.M. on January 9, 1981. The defendant's

truck drove past the police vehicle and Deputy Crum pulled in behind it. The defendant then pulled over and stopped a short distance down the street in a parking lot without any signals from Deputy Crum. The police vehicle pulled over and stopped near the defendant's truck.

The defendant exited his truck at about the same time Deputy Crum exited his police vehicle. The defendant left his driver's door open and the light inside the truck was shining. Deputy Crum met the defendant at the front of the police vehicle and near the front door of the defendant's truck. As the two conversed, Deputy Crum recognized the black pistol case lying on the front seat of the defendant's truck from the vantage point of his position near the open door.

Deputy Crum then asked what was in the case and the defendant stated his pistol was in the case. As that time Deputy Crum arrested the defendant for possessing the firearm and advised him of his Constitutional Rights. Deputy Crum then retrieved the case, unzipped

it and discovered the long barrel revolver inside.

On the way to the police station the defendant, who was seated on the front seat of the police vehicle stated, "You're going to find it when we get to the office anyway. If you'll reach in my back pocket, there is another pistol in my back pocket." (See Transcript Page 22) Deputy Crum then reached in the defendant's back pocket and retrieved a small concealed .25 calibre automatic pistol.

The defendant was charged by bill of information with violating Louisiana Revised Statutes 14:95.1 because he was in the possession of firearms after having been convicted of simple burglary.

Prior to trial, defendant filed a Motion to Suppress Evidence based upon the warrantless seizure of evidence from his person and truck. Judge John C. Morris, Jr., the trial judge, denied the Motion to Suppress.

Subsequently, the defendant plead guilty to the reduced charge of attempted possession of a firearm by a convicted felon in violation of Louisiana Revised Statutes 14:95.1 with the

reservation to appeal the adverse ruling of the trial court on the Motion to Suppress. The defendant was sentenced to serve for a period of one and one-half years at hard labor under the supervision of the Department of Corrections. This sentence was to run concurrently with the simple burglary sentence described above. In addition, the defendant was sentenced to pay a fine of $500.00 and court costs. (See Excerpts From Court Minutes, Transcript Page 4). The defendant appealed this conviction, relying upon one Assignment of Error relating to the overruling of the Motion to Suppress Evidence. (See Assignment of Error, Transcript Page 13).

ARGUMENT

MAY IT PLEASE THE COURT:

In order to properly determine whether the trial judge erred in denying the defendant's Motion to Suppress Evidence, several questions must be answered. First of all, it must be established that an unreasonable search and seizure actually took place. Secondly, assuming that an unreasonable search and seizure did occur, it must be determined whether the challenged search and seizure violated an interest of the defendant which the Fourth Amendment to the United States Constitution was designed to protect. Thirdly, assuming that the above is true, it must then be established whether the warrantless seizure was justified under one of the exceptions to the warrant requirement.

It follows then that the first query is whether an unreasonable search and seizure in violation of the defendant's rights under the Fourth Amendment to the United States Constitution actually took place.

First of all, it is contended by the State of Louisiana that when an officer inadvertently observes evidence of a crime from a vantage point that does not intrude upon a protected area, there should be no violation of the search warrant rule because there has been no search.

In the case at bar, there can be no doubt that Deputy Crum did not intrude upon the defendant's protected area by standing on a public parking lot near the defendant's open truck door. (See Transcript Page 21). Therefore, Deputy Crum did not conduct an unconstitutional search of the .357 magnum long barrel revolver located on the defendant's truck seat. In addition, Deputy Crum did not conduct an unconstitutional search of the .25 calibre automatic pistol located in the defendant's back pant's pocket because the defendant himself requested that Deputy Crum secure the concealed weapon from his person. (See Transcript Page 22). Assuming there was not an unconstitutional search in the case at bar, we must now determine whether the defendant's constitutional rights were violated when Deputy Crum entered the truck and

the defendant's pocket and seized the firearms without a warrant.

The defendant had been convicted of Simple Burglary and was on active supervised probation at the time of the seizure of the firearms. Therefore, the defendant's status as a probationer requires that we determine whether and to what extent he had a reasonable expectation of privacy regarding the seizure of evidence herein.

It is the contention of the State of Louisiana that a probationer, such as the defendant, should enjoy a reduced expectation of privacy and should not have the same freedom from governmental intrusion as the ordinary citizen.

In the case at bar, Deputy Crum knew that the defendant was on active supervised probation for his simple burglary conviction. (See Transcript Page 20). He knew that it was a violation of his probation for the defendant to own or possess firearms. (See Transcript Page 20). He also knew that it was a violation of law for one convicted of simple burglary to

own or possess firearms. (See Transcript Page 20). He had been told by a confidential and reliable informant, whose credibility has not been attacked in this appeal, that the defendant carried a long barrel revolver with him in his personal truck and in his employer's truck. (See Transcript Page 18). The revolver, its black case and the defendant's truck were personally known by Deputy Crum. (See Transcript Pages 18 and 19).

With this information in mind, Deputy Crum, working by himself, parked his vehicle near the defendant's employer's premises during the early morning hours of January 9, 1981. (See Transcript Page 20). The defendant drove away from the premises at about 3:15 A.M. in his truck and passed by Deputy Crum's police vehicle. (See Transcript Page 20). Deputy Crum pulled out behind the defendant's truck and without any signal from Deputy Crum, the defendant slowed down and parked in the adjacent parking lot. (See Transcript Page 21). Deputy Crum parked his car near the driver's door of the defendant's truck and both men

got out of their vehicles almost simultaneously. (See Transcript Page 21).

Deputy Crum met the defendant at the front of his police vehicle and near the open door of the defendant's truck. (See Transcript Page 21). The light inside the defendant's truck was shining. (see Transcript Page 21). Deputy Crum and the defendant talked for a few minues and, as they conversed, Deputy Crum looked inside the defendant's truck from his position on the parking lot and observed a black pistol case, which he had seen on prior occasions in the possession of the defendant, lying on the truck seat. (see Transcipt Pages 19,21,23 and 24). Deputy Crum then asked the defendant what was in the case and the defendant stated that his pistol was in the case. (See Transcript Page 21). At this time Deputy Crum arrested the defendant for the possession of the firearm and advised him of his constitutional rights. (See Transcript Page 22). Then Deputy Crum entered the open truck door and retrieved the black pistol case. Inside the case he discovered a long barrel revolver as described by the

informant and the defendant and of which he had personal knowledge. (See Transcript Page 19,21,23 and 24).

As Deputy Crum was transporting the defendant to the police station, the latter said, "you're going to find it when we get to the office anyway. If you'll reach in my back pocket, there is another pistol in my back pocket." (See Transcript Page 22). At this, Deputy Crum reached into the defendant's back pant's pocket and retrieved the concealed .25 calibre automatic pistol. (See Transcript Page 22).

It is the contention of the State of Louisiana that the seizure of these two firearms was reasonable and not in violation of defendant's constitutional rights. In the case of Bell-V.-Wolfish, 441 U.S. 520,559, 99 S.Ct. 1861, 1884,60 L.Ed.2d 447,481 (1979) this Honorable Court stated the following test of reasonableness for searches and seizures under the Fourth Amendment, to-wit:

> "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case

> it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it and the place in which it is conducted." [cites omitted]

Following the guidelines set forth above, there can be no doubt that Deputy Crum did not intrude upon the defendant's protected area by standing on a public parking lot near the defendant's open truck door and, from that vantage point, observing a black pistol case lying on the truck seat. It is also obvious that Deputy Crum was justified in asking the defendant what was in the case based on the information he had available and his prior knowledge of the defendant's activities. The defendant's statement that his pistol was in the case gave Deputy Crum reasonable cause to initiate the limited seizure of the .357 magnum long barrel revolver from the defendant's truck seat. The seizure of this firearm was, therefore, reasonable under the four requirements cited above and was not a violation of the defendant's re-

duced expectation of privacy as a probationer.

In addition, the four requirements under the test of reasonableness cited above are satisfied in Deputy Crum's seizure of the concealed .25 calibre automatic pistol from the defendant's back pant's pocket. The defendant himself requested that Deputy Crum take the firearm and, therefore, the scope of the particular intrusion, the manner in which it was conducted, the justification for initiating it and the place in which it was conducted were all reasonable and not in violation of the defendant's reduced expectation of privacy as a probationer.

It is submitted by the State of Louisiana that the challenged seizure of the two firearms did not violate an interest of the defendant which the Fourth Amendment to the United States Constitution was designed to protect.

It follows that the final inquiry is whether the search and seizure of the two firearms was justified under one of the exceptions to the warrant requirement. The State of Louisiana will argue the seizure of the .357 magnum long barrel revolver from the defendant's truck seat first

before proceeding to the argument regarding the seizure of the .25 calibre pistol secured from the defendant's back pant's pocket to avoid confusion.

The State of Louisiana contends, first of all, that the seizure of the .357 magnum revolver should be condoned as incident to the defendant's lawful arrest and by virtue of the plain view doctrine and the automobile exception to the warrant requirement.

Since the defendant's arrest was made without benefit of the issuance of an arrest warrant, we must first determine whether there existed probable cause to arrest him.

Probable cause exists when facts and circumstances within the arresting officer's knowledge and of which he has reasonable and trustworthy information are sufficient to justify a man of average caution in the belief that the person to be arrested has committed or is committing an offense. Brienegar-V.-United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949).

The arresting officer, Deputy Crum, was in possession of the following facts: (1) he

knew the defendant personally having previously arrested him for simple burglary and, on another occasion, for possession of marijuana; (2) he knew that the defendant was on active supervised probation for his simple burglary conviction; (3) he knew it was a violation of his probation for the defendant to own or possess firearms; (4) he knew that it was a violation of law for one convicted of simple burglary to own or possess firearms; (5) he had been told by a confidential and reliable informant that the defendant carried a long barrel revolver with him in his personal truck and in his employer's truck; (6) this information came to Deputy Crum within three days prior to the seizure of evidence; (7) the informant's information was based on the latter's first-hand personal information; (8) the revolver, its black case and the defendant's personal truck were personally known by Deputy Crum; (9) he saw the defendant drive by his location in the truck in question from the defendant's place of employment; (10) after both vehicles stopped,

Deputy Crum visually observed the black pistol case, which he was familiar with, lying on the truck seat and (11) when questioned about the case, the defendant replied that his pistol was in the case.

It is submitted by the State of Louisiana that Deputy Crum's knowledge of these facts and circumstances satisfies a basic standard for probable cause. Given Deputy Crum's awareness of the defendant's simple burglary conviction and his status as a probationer, the information he received from the confidential reliable informant, his observations of the defendant and the pistol case and the defendant's statement that his pistol was in the case, as a man of average caution he was justified in believing that the defendant was committing the offense in question.

Assuming, therefore, that Deputy Crum did have probable cause to arrest the defendant, the question remains as to whether the warrantless seizure of the .357 magnum revolver from the defendant's truck seat was permissible.

It is the contention of the State of Lou-

isiana that the plain view doctrine is applicable in this case

In order for the "plain-view" doctrine to be applicable, there must have been a prior justification for an intrusion into a protected area, in the course of which evidence was discovered inadvertently, or an officer must have inadvertently observed evidence of a crime from a vantage point without intrusion upon a protected area, and it must have been immediately apparent without close inspection that the items were evidence or contraband. When an officer observes evidence of a crime before entering a protected area, he may not seize the evidence without first obtaining a warrant, absent exigent circumstances or another exception to the warrant requirement. Coolidge-V.-New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

The record of the hearing on the Motion to Suppress Evidence reveals that Deputy Crum, working by himself, saw the black pistol case, which he had seen containing a long barrel pistol on previous arrests of the defendant, lying

on the defendant's truck seat. Deputy Crum observed this evidence through the open door of the defendant's truck. The inside of the cab of the truck was illuminated by the overhead light. Deputy Crum was standing near the truck on a public parking lot and was conversing with the defendant when he saw the black pistol case. When Deputy Crum asked what was inside the case, the defendant replied his pistol was inside the case.

The seizure of the black case and the .357 magnum revolver was inadvertent and the evidentiary character of those items seized was immediastely obvious. Deputy Crum inadvertently observed the evidence from a vantage point without intrusion upon a protected area. In addition, the probable cause to arrest the defendant for the apparent commission of the offense in question also would give Deputy Crum probable cause to search the vehicle for the major object of the crime, the firearm itself. Also, Deputy Crum's entry into the open truck door appears justified by exigent circum-

stances. Exigency here may be summarized in the fact that the truck could have been moved or the evidence lost or destroyed. In addition, Deputy Crum's actions were in keeping with officer safety based upon the defendant's proximity to the firearm and the officer's knowledge of the defendant's previous criminal behavior. It is the State's contention that the seizure of the evidence was reasonable under these circumstances.

The seizure of the evidence is also justified as one incident to a lawful arrest, another exception to the warrant requirement. Chimel-V.-California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). It has been held by this Honorable Court that this justification for a warrantless search of a person arrested for a crime is within the conceptual scope of removing any weapons from within the possible reach of the arrested person. Chimel-V.-California, supra.

The evidence seized herein was in plain view on the seat of the truck with the driver's door open and under circumstances in which

the defendant was standing near the truck with its interior under his immediate control. Therefore, it is the State's contention that this exception to the warrant requirement is also applicable in the case at bar.

In addition to the plain view doctrine and the search incident to a lawful arrest exceptions to the warrant requirement, the State of Louisiana suggests that the seizure of the evidence herein was also in keeping with the automobile exception to the warrant requirement.

This Honorable Court has recognized that a person's expectation of privacy in an automobile or truck is less than in a home or office. Carroll-V.-United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). It has also been held that the police may stop a moving vehicle when there is probable cause of criminal activity or an investigatory stop may be made when the detaining officer has articulable knowledge of specific facts that give rise to a reasonable suspicion of criminal activity. Chambers-V.-

Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); Carroll-V.-United States, supra.

It is contended by the State of Louisiana that, if indeed an investigatory stop was made, Deputy Larry Crum had sufficient probable cause or at least sufficient articulable knowledge of specific facts that give rise to a reasonable suspicion of criminal activity to justify the stopping of the defendant's truck and questioning the defendant. These specific facts within Deputy Crum's knowledge have been previously argued in detail in this brief. Therefore, the State contends that the stop was lawful.

The courts have also held that once a vehicle has been stopped on either ground, a warrantless search of the vehicle will be justified on the ground of probable cause plus exigent circumstances. Coolidge-V. New Hampshire, supra.

Once the defendant's truck had been stopped, Deputy Crum obtained sufficient probable cause and there existed exigent circumstances for the seizure of the firearm and its case.

The probable cause factors have been previously outlined in this brief. The exigent circumstances necessitating the seizure of the evidence include: (1) the evidence was capable of being hidden during the delay required to get a search warrant; (2) Deputy Crum, working by himself, had a "fleeing opportunity" to search the truck; (3) there was no immediate police backup to secure protection of the evidence during the delay in obtaining a search warrant; (4) the lateness of the hour (3:15 A.M.) made the securing of a search warrant almost impossible prior to day break; (5) the truck could have been moved during the delay to obtain a search warrant, and (6) Deputy Crum's actions were in keeping with officer safety based upon the defendant's proximity to the firearm and the officer's knowledge of the defendant's previous criminal behavior.

Having made the investigatory stop, Deputy Crum, through the open door of the lighted truck, saw a black pistol case on the front seat in plain view. When Deputy Crum asked the defendant what was in the case, the defen-

dant replied his pistol was in the case. The defendant, to this officer's knowledge, had been convicted of simple burglary, was placed on active supervised probation and was allegedly carrying firearms in the truck in question.

It is obvious, therefore, that Deputy Crum's observation of the black pistol case on the front seat of the truck together with the defendant's admission that his pistol was in the case and the prior information given to Deputy Crum by his informant, supplied the officer with sufficient probable cause to believe that a firearm was located inside the black pistol case. It has been held by this Honorable Court that when probable cause exists for the searching of a vehicle and circumstances render a warrant impractical, a warrantless search of the automobile does not violate the Fourth Amendment. Chambers-V.-Maroney, supra, Carroll-V.-United States, supra.

In addition, this Honorable Court has held in United States-V.-Ross, 102 S.Ct. 2157 (1982) that the "automobile exception" may be

extended to include the right to search containers found in a vehicle legitimately stopped by police officers under the Carroll Doctrine.

It is therefore submitted by the State of Louisiana that the trial judge did not err in denying the defendant's Motion to Suppress Evidence regarding the .357 magnum long barrel revolver seized from the defendant's truck.

Now, turning to the .25 calibre automatic pistol, it is the contention of the State of Louisiana that this firearm was seized by Deputy Crum as the result of the lawful consent of the defendant and as an incident to his lawful arrest.

The following is the series of questions and answers regarding the seizure of the .25 calibre automatic pistol found on page 22 of the Transcript, to-wit:

"Q. And what happened at that point?

A. At this time I talked with Deputy Sanders on the radio. I had asked Mr. Kline would

it be alright for another officer to drive his truck in to save having to call a wrecker at that time of the morning. Deputy Sanders came around and did drive the vehicle to the courthouse for me. On the way to the courthouse, Mr. Kline stated to me, he said, 'you're going to find it when we get to the office anyway.' and leaned forward and said 'If you'll reach in my back pocket, there is another pistol in my back pocket.'

Q. What did you do at that time?

A. I reached into his back pocket and retrieved the weapon.

Q. Was the weapon concealed?

A. Yes, sir. It was in his back pocket and unable to see it.

Q. What kind of weapon was this?

A. It was a small .25 calibre, automatic, nickel plated."

A valid consent given by a defendant to law enforcement officers to search is a well-recognized exception to the requirement of a search warrant and a search pursuant to defendant's voluntary consent need not be based on probable cause. Scheckloth-V.-Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

The defendant in the case at bar told the officer where the firearm could be found, in his back pocket. In fact, the defendant requested that the officer remove the firearm which Deputy Crum did. Deputy Crum exerted no effort to coerce or dominate the defendant into giving his permission to seize the firearm principally because he was not aware of the firearm's presence on the defendant.

Deputy Crum could also have seized the .25 calibre pistol from the defendant at the moment of his arrest as an incident of the lawful arrest for the reasons stated in detail in other portions of this brief.

It is therefore submitted by the State of Louisiana that the trial judge did not err in denying the defendant's Motion to Suppress

Evidence regarding the .25 calibre automatic pistol seized from the defendant's person.

Defendant apparently argues that Deputy Crum had probable cause and sufficient time to obtain a warrant prior to his seizure of this evidence. He apparently contends that because Deputy Crum did not secure a search warrant for the defendant's truck, the seizure of the evidence herein is illegal because there existed no exigent circumstances.

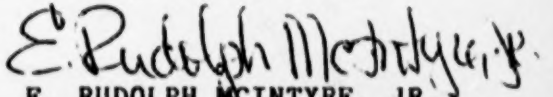
It is apparent to the State of Louisiana, however, from a review of the Transcript, that Deputy Crum did not feel he had probable cause to secure a search warrant until all of the facts fell into place at the time of the seizure of the evidence. (See Transcript Page 26). It was only then that Deputy Crum had a reasonable belief that the defendant was committing an offense. The circumstances which strengthened the informant's tip at the scene of the seizure were Deputy Crum's observation of the black pistol case and the defendant's admission that it contained his pistol. At that

time Deputy Crum had probable cause to seize the firearm and its case but exigent circumstances forced immediate action. There was no time to secure a search warrant. The defendant's argument is without merit.

CONCLUSION

For the reason that the decision of the Louisiana Supreme Court in this case is supported by the Bell-V.-Wolfish, supra, and Chimel-V.-California, supra, and Carroll -V.- United States, supra, and Chambers-V.-Maroney, supra, and Coolidge-V.-New Hampshire, supra, and Scheckloth-V.-Bustamonte, supra, and United States-V.-Ross, supra, cases, the State of Louisiana respectfully submits that this Honorable Court should refuse to grant a Writ of Certiorari in this case and that the petition for Writ of Certiorari filed herein be dismissed.

RESPECTFULLY SUBMITTED



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